

THE ECLIPSE GROUP LLP

Edward F. O'Connor, Esq. (State Bar No. 123398)

Email: efo@eclipsegrp.com

Jennifer H. Hamilton (State Bar No. 220439)

Email: jhh@eclipsegrp.com

2020 Main Street, Suite 600

Irvine, CA 92614

Telephone: 949.851.5000

Facsimile: 949.851.5051

Attorneys for Plaintiff

MERCHSOURCE, LLC

K. TOM KOHAN

KOHAN LAW FIRM

445 South Figueroa Street, 27th Floor

Los Angeles, CA 90071

Tel: 310-349-1111

Fax: 213-612-7715

Attorneys for Defendants

SAKAR INTERNATIONAL, INC.

& CRAYOLA PROPERTIES, INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MERCHSOURCE, LLC, a Delaware
limited liability corporation

Plaintiff,

vs.

SAKAR INTERNATIONAL, INC., a
New York corporation, Crayola
Properties, Inc., a Delaware
corporation, and DOES 1-10, inclusive,

Defendants.

Case No.: SACV 13-1577-AG(JPRx)

HONORABLE ANDREW J.
GUILFORD STANDING
PROTECTIVE ORDER

1 **1. PURPOSE AND LIMITS OF THIS ORDER**

2 Discovery in this action is likely to involve confidential, proprietary, or
 3 private information requiring special protection from public disclosure and from
 4 use for any purpose other than this litigation. Thus, the Court enters this Protective
 5 Order. This Order does not confer blanket protections on all disclosures or
 6 responses to discovery, and the protection it gives from public disclosure and use
 7 extends only to the specific material entitled to confidential treatment under the
 8 applicable legal principles. This Order does not automatically authorize the filing
 9 under seal of material designated under this Order. Instead, the parties must
 10 comply with L.R. 79-5.1 if they seek to file anything under seal. This Order does
 11 not govern the use at trial of material designated under this Order.

12 **2. DESIGNATING PROTECTED MATERIAL**

13 **2.1 Over-Designation Prohibited.** Any party or non-party who
 14 designates information or items for protection under this Order as
 15 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEY EYES
 16 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” (a “designator”)
 17 must only designate specific material that qualifies under the appropriate standards.
 18 To the extent practicable, only those parts of documents, items, or oral or written
 19 communications that require protection shall be designated. Designations with a
 20 higher confidentiality level when a lower level would suffice are prohibited. Mass,
 21 indiscriminate, or routinized designations are prohibited. Unjustified designations
 22 expose the designator to sanctions, including the Court’s striking all confidentiality
 23 designations made by that designator. Designation under this Order is allowed only
 24 if the designation is necessary to protect material that, if disclosed to persons not
 25 authorized to view it, would cause competitive or other recognized harm. Material
 26 may not be designated if it has been made public, or if designation is otherwise
 27 unnecessary to protect a secrecy interest. If a designator learns that information or
 28 items that it designated for protection do not qualify for protection at all or do not

1 qualify for the level of protection initially asserted, that designator must promptly
 2 notify all parties that it is withdrawing the mistaken designation.

3 **2.2 Manner and Timing of Designations.** Designation under this Order
 4 requires the designator to affix the applicable legend (“CONFIDENTIAL,”
 5 “HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY,” or “HIGHLY
 6 CONFIDENTIAL – SOURCE CODE”) to each page that contains protected
 7 material. For testimony given in deposition or other proceeding, the designator
 8 shall specify all protected testimony and the level of protection being asserted. It
 9 may make that designation during the deposition or proceeding, or may invoke, on
 10 the record or by written notice to all parties on or before the next business day, a
 11 right to have up to 21 days from the deposition or proceeding to make its
 12 designation.

13 **2.2.1** A party or non-party that makes original documents or materials
 14 available for inspection need not designate them for protection until after the
 15 inspecting party has identified which material it would like copied and
 16 produced. During the inspection and before the designation, all material
 17 shall be treated as HIGHLY CONFIDENTIAL – ATTORNEY EYES
 18 ONLY. After the inspecting party has identified the documents it wants
 19 copied and produced, the producing party must designate the documents, or
 20 portions thereof, that qualify for protection under this Order.

21 **2.2.2** Parties shall give advance notice if they expect a deposition or
 22 other proceeding to include designated material so that the other parties can
 23 ensure that only authorized individuals are present at those proceedings
 24 when such material is disclosed or used. The use of a document as an exhibit
 25 at a deposition shall not in any way affect its designation. Transcripts
 26 containing designated material shall have a legend on the title page noting
 27 the presence of designated material, and the title page shall be followed by a
 28 list of all pages (including line numbers as appropriate) that have been

1 designated, and the level of protection being asserted. The designator shall
 2 inform the court reporter of these requirements. Any transcript that is
 3 prepared before the expiration of the 21-day period for designation shall be
 4 treated during that period as if it had been designated HIGHLY
 5 CONFIDENTIAL – ATTORNEY EYES ONLY unless otherwise agreed.
 6 After the expiration of the 21-day period, the transcript shall be treated only
 7 as actually designated.

8 **2.3 Inadvertent Failures to Designate.** An inadvertent failure to
 9 designate does not, standing alone, waive protection under this Order. Upon timely
 10 assertion or correction of a designation, all recipients must make reasonable efforts
 11 to ensure that the material is treated according to this Order.

12 **3. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

13 All challenges to confidentiality designations shall proceed under L.R. 37-1
 14 through L.R. 37-4.

15 **4. ACCESS TO DESIGNATED MATERIAL**

16 **4.1 Basic Principles.** A receiving party may use designated material only
 17 for this litigation. Designated material may be disclosed only to the categories of
 18 persons and under the conditions described in this Order.

19 **4.2 Disclosure of CONFIDENTIAL Material Without Further**
 20 **Approval.** Unless otherwise ordered by the Court or permitted in writing by the
 21 designator, a receiving party may disclose any material designated
 22 CONFIDENTIAL only to:

23 **4.2.1** The receiving party's outside counsel of record in this action and
 24 employees of outside counsel of record to whom disclosure is reasonably
 25 necessary;

26 **4.2.2** The officers, directors, and employees of the receiving party to
 27 whom disclosure is reasonably necessary, and who have signed the
 28 Agreement to Be Bound (Exhibit A);

1 **4.2.3** Experts retained by the receiving party's outside counsel of
 2 record to whom disclosure is reasonably necessary, and who have signed the
 3 Agreement to Be Bound (Exhibit A);

4 **4.2.4** The Court and its personnel;

5 **4.2.5** Outside court reporters and their staff, professional jury or trial
 6 consultants, and professional vendors to whom disclosure is reasonably
 7 necessary, and who have signed the Agreement to Be Bound (Exhibit A);

8 **4.2.6** During their depositions, witnesses in the action to whom
 9 disclosure is reasonably necessary and who have signed the Agreement to
 10 Be Bound (Exhibit A); and

11 **4.2.7** The author or recipient of a document containing the material, or
 12 a custodian or other person who otherwise possessed or knew the
 13 information.

14 **4.3 Disclosure of HIGHLY CONFIDENTIAL – ATTORNEY EYES**
 15 **ONLY and HIGHLY CONFIDENTIAL – SOURCE CODE Material Without**
 16 **Further Approval.** Unless permitted in writing by the designator, a receiving
 17 party may disclose material designated HIGHLY CONFIDENTIAL –
 18 ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE
 19 without further approval only to:

20 **4.3.1** The receiving party's outside counsel of record in this action and
 21 employees of outside counsel of record to whom it is reasonably necessary
 22 to disclose the information;

23 **4.3.2** The Court and its personnel;

24 **4.3.3** Outside court reporters and their staff, professional jury or trial
 25 consultants, and professional vendors to whom disclosure is reasonably
 26 necessary, and who have signed the Agreement to Be Bound (Exhibit A);
 27 and
 28

1 **4.3.4** The author or recipient of a document containing the material, or
 2 a custodian or other person who otherwise possessed or knew the
 3 information.

4 **4.4 Procedures for Approving or Objecting to Disclosure of**
 5 **HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY**
 6 **CONFIDENTIAL – SOURCE CODE Material to In-House Counsel or**
 7 **Experts.** Unless agreed to in writing by the designator:

8 **4.4.1** A party seeking to disclose to in-house counsel any material
 9 designated HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY must
 10 first make a written request to the designator providing the full name of the
 11 in-house counsel, the city and state of such counsel's residence, and such
 12 counsel's current and reasonably foreseeable future primary job duties and
 13 responsibilities in sufficient detail to determine present or potential
 14 involvement in any competitive decision-making. In-house counsel are not
 15 authorized to receive material designated HIGHLY CONFIDENTIAL –
 16 SOURCE CODE.

17 **4.4.2** A party seeking to disclose to an expert retained by outside
 18 counsel of record any information or item that has been designated HIGHLY
 19 CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
 20 CONFIDENTIAL – SOURCE CODE must first make a written request to
 21 the designator that (1) identifies the general categories of HIGHLY
 22 CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
 23 CONFIDENTIAL – SOURCE CODE information that the receiving party
 24 seeks permission to disclose to the expert, (2) sets forth the full name of the
 25 expert and the city and state of his or her primary residence, (3) attaches a
 26 copy of the expert's current resume, (4) identifies the expert's current
 27 employer(s), (5) identifies each person or entity from whom the expert has
 28 received compensation or funding for work in his or her areas of expertise

(including in connection with litigation) in the past five years, and (6) identifies (by name and number of the case, filing date, and location of court) any litigation where the expert has offered expert testimony, including by declaration, report, or testimony at deposition or trial, in the past five years. If the expert believes any of this information at (4) - (6) is subject to a confidentiality obligation to a third party, then the expert should provide whatever information the expert believes can be disclosed without violating any confidentiality agreements, and the party seeking to disclose the information to the expert shall be available to meet and confer with the designator regarding any such confidentiality obligations.

4.4.3 A party that makes a request and provides the information specified in paragraphs 4.4.1 or 4.4.2 may disclose the designated material to the identified in-house counsel or expert unless, within seven days of delivering the request, the party receives a written objection from the designator providing detailed grounds for the objection.

4.4.4 All challenges to objections from the designator shall proceed under L.R. 37-1 through L.R. 37-4.

5. SOURCE CODE

5.1 Designation of Source Code. If production of source code is necessary, a party may designate it as HIGHLY CONFIDENTIAL – SOURCE CODE if it is, or includes, confidential, proprietary, or trade secret source code.

5.2 Location and Supervision of Inspection. Any HIGHLY CONFIDENTIAL – SOURCE CODE produced in discovery shall be made available for inspection, in a format allowing it to be reasonably reviewed and searched, during normal business hours or at other mutually agreeable times, at an office of the designating party's counsel or another mutually agreeable location. The source code shall be made available for inspection on a secured computer in a secured room, and the inspecting party shall not copy, remove, or otherwise

1 transfer any portion of the source code onto any recordable media or recordable
 2 device. The designator may visually monitor the activities of the inspecting party's
 3 representatives during any source code review, but only to ensure that there is no
 4 unauthorized recording, copying, or transmission of the source code.

5 **5.3 Paper Copies of Source Code Excerpts.** The inspecting party may
 6 request paper copies of limited portions of source code that are reasonably
 7 necessary for the preparation of court filings, pleadings, expert reports, other
 8 papers, or for deposition or trial. The designator shall provide all such source code
 9 in paper form, including Bates numbers and the label "HIGHLY CONFIDENTIAL
 10 – SOURCE CODE."

11 **5.4 Access Record.** The inspecting party shall maintain a record of any
 12 individual who has inspected any portion of the source code in electronic or paper
 13 form, and shall maintain all paper copies of any printed portions of the source code
 14 in a secured, locked area. The inspecting party shall not convert any of the
 15 information contained in the paper copies into any electronic format other than for
 16 the preparation of a pleading, exhibit, expert report, discovery document,
 17 deposition transcript, or other Court document. Any paper copies used during a
 18 deposition shall be retrieved at the end of each day and must not be left with a
 19 court reporter or any other unauthorized individual.

20 **6. PROSECUTION BAR**

21 Absent written consent from the designator, any individual who receives
 22 access to HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
 23 CONFIDENTIAL – SOURCE CODE information shall not be involved in the
 24 prosecution of patents or patent applications concerning the field of the invention
 25 of the patents-in-suit for the receiving party or its acquirer, successor, predecessor,
 26 or other affiliate during the pendency of this action and for one year after its
 27 conclusion, including any appeals. "Prosecution" means drafting, amending,
 28 advising on the content of, or otherwise affecting the scope or content of patent

claims or specifications. These prohibitions shall not preclude counsel from participating in reexamination or *inter partes* review proceedings to challenge or defend the validity of any patent, but counsel may not participate in the drafting of amended claims in any such proceedings.

**7. PROTECTED MATERIAL SUBPOENAED OR ORDERED
PRODUCED IN OTHER LITIGATION**

7.1 Subpoenas and Court Orders. This Order in no way excuses non-compliance with a lawful subpoena or court order. The purpose of the duties described in this section is to alert the interested parties to the existence of this Order and to give the designator an opportunity to protect its confidentiality interests in the court where the subpoena or order issued.

7.2 Notification Requirement. If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, or HIGHLY CONFIDENTIAL – SOURCE CODE, that party must:

7.2.1 Promptly notify the designator in writing. Such notification shall include a copy of the subpoena or court order;

7.2.2 Promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Order. Such notification shall include a copy of this Order; and

7.2.3 Cooperate with all reasonable procedures sought by the designator whose material may be affected.

7.3 Wait For Resolution of Protective Order. If the designator timely seeks a protective order, the party served with the subpoena or court order shall not produce any information designated in this action as CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL –

1 SOURCE CODE before a determination by the court where the subpoena or order
 2 issued, unless the party has obtained the designator's permission. The designator
 3 shall bear the burden and expense of seeking protection of its confidential material
 4 in that court.

5 **8. UNAUTHORIZED DISCLOSURE OF DESIGNATED MATERIAL**

6 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
 7 designated material to any person or in any circumstance not authorized under this
 8 Order, it must immediately (1) notify in writing the designator of the unauthorized
 9 disclosures, (2) use its best efforts to retrieve all unauthorized copies of the
 10 designated material, (3) inform the person or persons to whom unauthorized
 11 disclosures were made of all the terms of this Order, and (4) use reasonable efforts
 12 to have such person or persons execute the Agreement to Be Bound (Exhibit A).

13 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR**
 14 **OTHERWISE PROTECTED MATERIAL**

15 When a producing party gives notice that certain inadvertently produced
 16 material is subject to a claim of privilege or other protection, the obligations of the
 17 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).
 18 This provision is not intended to modify whatever procedure may be established in
 19 an e-discovery order that provides for production without prior privilege review
 20 pursuant to Federal Rule of Evidence 502(d) and (e).

21 **10. FILING UNDER SEAL**

22 Without written permission from the designator or a Court order, a party
 23 may not file in the public record in this action any designated material. A party
 24 seeking to file under seal any designated material must comply with L.R. 79-5.1.
 25 Filings may be made under seal only pursuant to a court order authorizing the
 26 sealing of the specific material at issue. The fact that a document has been
 27 designated under this Order is insufficient to justify filing under seal. Instead,
 28 parties must explain the basis for confidentiality of each document sought to be

1 filed under seal. Because a party other than the designator will often be seeking to
2 file designated material, cooperation between the parties in preparing, and in
3 reducing the number and extent of, requests for under seal filing is essential. If a
4 receiving party's request to file designated material under seal pursuant to L.R. 79-
5 5.1 is denied by the Court, then the receiving party may file the material in the
6 public record unless (1) the designator seeks reconsideration within four days of
7 the denial, or (2) as otherwise instructed by the Court.

8 **11. FINAL DISPOSITION**

9 Within 60 days after the final disposition of this action, each party shall
10 return all designated material to the designator or destroy such material, including
11 all copies, abstracts, compilations, summaries, and any other format reproducing or
12 capturing any designated material. The receiving party must submit a written
13 certification to the designator by the 60-day deadline that (1) identifies (by
14 category, where appropriate) all the designated material that was returned or
15 destroyed, and (2) affirms that the receiving party has not retained any copies,
16 abstracts, compilations, summaries, or any other format reproducing or capturing
17 any of the designated material. This provision shall not prevent counsel from
18 retaining an archival copy of all pleadings, motion papers, trial, deposition, and
19 hearing transcripts, legal memoranda, correspondence, deposition and trial
20
21
22
23
24
25
26
27
28

1 exhibits, expert reports, attorney work product, and consultant and expert work
2 product, even if such materials contain designated material. Any such archival
3 copies remain subject to this Order.

4 AGREED TO BY:

5 Dated: November 12, 2014

By: s/Edward F. O'Connor
THE ECLIPSE GROUP LLP
Edward F. O'Connor, Esq.
Jennifer H. Hamilton, Esq.
Attorneys for Plaintiff
MERCHSOURCE, LLC

10 Dated: November 12, 2014

By: s/K. Tom Kohan
K. TOM KOHAN
Attorneys for Defendants
SAKAR INTERNATIONAL, INC.
& CRAYOLA PROPERTIES, INC.

15 IT IS SO ORDERED.

16 DATED: November 21, 2014



United States Magistrate Judge

EXHIBIT A

AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury
that I have read in its entirety and understand the Protective Order that was issued
by the United States District Court for the Central District of California on
_____ [date] in the case of _____ [insert formal name of the case and the
number and initials assigned to it by the court]. I agree to comply with and to be
bound by all the terms of this Protective Order, and I understand and acknowledge
that failure to so comply could expose me to sanctions and punishment for
contempt. I solemnly promise that I will not disclose in any manner any
information or item that is subject to this Protective Order to any person or entity
except in strict compliance with this Order.

I further agree to submit to the jurisdiction of the United States District
Court for the Central District of California for the purpose of enforcing this Order,
even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and
telephone number] as my California agent for service of process in connection with
this action or any proceedings related to enforcement of this Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

[printed name]

Signature: _____

[signature]

PROOF OF SERVICE

I, the undersigned, declare and certify as follows:

I am over the age of eighteen (18) years and employed in the County of Orange, State of California. I am employed in the office of THE ECLIPSE GROUP LLP, members of the Bar of the above entitled Court, and I made the service referred to below at their direction. My business address is 2020 Main Street, Suite 600, Irvine, California 92614.

On November 12, 2014, I served the foregoing document:

HONORABLE ANDREW J. GUILFORD STANDING PROTECTIVE ORDER

☒ **VIA CM/ECF FILING SYSTEM.** The undersigned hereby certifies that she caused a copy of the foregoing document(s) to be filed with the clerk of the U.S. District Court, Central District of California, using the CM/ECF filing system, which caused a copy to be electronically mailed to the following CM/ECF Participant(s).

K. Tom Kohan
Kohan Law Firm
445 South Figueroa Street, 27th Floor
Los Angeles, CA 90071
tom@kohanlawfirm.com

Ezra Sutton, Esq.
Ezra Sutton & Associates, P.A.
900 Route 9 North
Woodbridge, NJ 07095

I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on November 12, 2014, at Orange County, California.

/s/Rebecca Meegan